United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-4249

76-4042

United States Court of Appeals

FOR THE SECOND CIRCUIT

PITTSTON STEVEDORING CORPORATION and
THE HOME INSURANCE COMPANY,
Petitioners,

v.

ANTHONY DELLAVENTURA,
Respondent,

and

DIRECTOR, OFFICE OF WORKERS COMPENSATION
PROGRAMS, U.S.D.L.,
Party in Interest.

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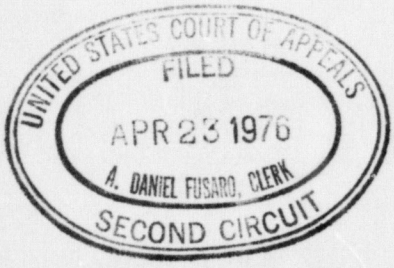
BRIEF FOR PETITIONERS



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BRIEF FOR PETITIONERS

Statement

This is a petition for review by Pittston Stevedoring Corporation and The Home Insurance Company of an order and decision of the Benefits Review Board which held that the claim of the respondent, Dellaventura, came within the purview of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq., as amended.

Question Presented

Whether the respondent, Anthony Dellaventura, was an employee as defined in Section 2(3) of the LHWCA as amended and whether the accident occurred within the parameters of the situs as defined in Section 3(a) of the said amended act.

Summary of Argument

1. The 1972 amendments to the Act do not afford coverage and consequent benefits of the Act to the respondent, Anthony Dellaventura, who was injured under such circumstances as are hereinafter outlined.

2. The respondent, Anthony Dellaventura, was not engaged in the loading or unloading of ships within the meaning of the amended Act, and his injury did not occur upon such site as would afford coverage under the act as amended.

Statement of Facts

THE RESPONDENT DELLAVENTURA, SUSTAINED A PERSONAL INJURY ON JUNE 27, 1973 IN THE PROCESS OF LOADING A TRUCK WITH COFFEE BAGS (A-20).

The accident occurred at pier 20 in Staten Island, New York (A-20).

The truck, being loaded, was not on the string piece but was within the area of building at the pier (A-29). Respondent Dellaventura was injured while actually within the body of the truck (A-30). He was engaged in helping the truckman (A-30).

On that day, he had not been aboard a ship nd he did not perform any work in opening hatches or operating winches (A-30).

The coffee in question was off-loaded from the ship Campeche on or about February 16, 1973 (A-40-A-48, A-54).

The Benefits Review Board found that the cargo on which the respondent Dellaventura had been working at the time of injury had been unloaded from a ship and placed on the pier 133 days prior to the accident (A-4).

POINT I

The respondent Dellaventura, was not an employee within the meaning of the Act at the time of his injury.

His injury did not occur at a site or area customarily used by an employer in loading or unloading a vessel.

The petition for review involves an individual who was in the employ of an employer as defined in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq., who was injured doing work for his employer in a marine terminal area.

At the time of injury he was assisting a truckman who had been sent to the pier to pick up a cargo of coffee.

It is beyond question that the coffee loaded by this individual into the body of the truck had been off-loaded from a vessel at least 133 days prior to the date of the instant accident.

In order to arrive at a proper determination of the controversy a close examination of the statute as amended, with particular reference to the outer limits of its geographical application and the occupational status of the injured worker, must be conducted.

It is contended herein, that there must be some continuity between the loading or unloading process and an accidental injury before the statute becomes operative. If there is a hiatus between the actual process of loading and unloading for whatever period of time, the character of the work is altered and the responsibility for the adjudication of the injury is changed.

In the instance where the injury occurs during a loading or unloading process, federal jurisdiction cannot be denied.

However, if the thread of continuity is severed then the responsibility lies with the appropriate state authority.

The authorities, prior to the 1972 amendments, are in agreement that the Act did not provide benefits to a stevedore employee injured on land, in spite of the fact that he may have been directly and actively engaged in loading or unloading a vessel.

> *Nacirema Operating Company, Inc.* v. *Johnson*, 396 U.S. 212, 90 S.Ct. 347 (1969).

In amending the Act, Congress changed the statutory definition of "employee". LHCA Sec. 902(3) and also the definition of "employer" (Sec. 902(4)). In addition, it extended landward from the edge of the water, the situs of injuries for which benefits under the Act could be paid. It was those employees coming within the purview of the definitions as amended who were accorded relief and liability was imposed on those employers who came within the also amended definitions.

It cannot be argued that every employee of a stevedore who sustains an injury anywhere on a pier performing any function whatsoever is now within the purview of the Act.

If it had been the intention of the Congress to so extend that coverage, it would have not been necessary to insert

the many limiting phrases appearing in amended section 2(3) and (4); and Section 3 of the Act would have been superfluous.

In its definition of the terms employee and employer, Congress bestowed certain limitations of coverage within the Act by the use of the terms "maritime employment" "longshoremen", "longshoring operation", and "other adjoining area customarily used by an employer in loading, unloading * * * a vessel."

Each of these limiting phrases clearly indicate that it was the congressional intent to extend the coverage of the Act only to certain stevedore employees, who were injured in certain areas of the pier and who in fact were performing certain well-defined, specific functions.

Therefore unless the injured employee meets the eligibility requirements of the amended statute, his claim is limited only to the applicable State compensation law.

In the instant case it is the position of the petitioner herein, that the claim now under review is not compensable under the Act, because it was not incurred in an employment or in a place which comes within the purview of the Act.

The term "longshoring operations" at the time of the 1972 amendments, was defined by the United States Department of Labor at 29 CFR 1918-3(i) as

> "The loading, unloading, moving or handling of cargo, ship stores, gear, etc. into, in or out of any vessel on the navigable waters of the United States."

The above definition is also to be found in the Safety and Health standards for maritime employment, Section 29 CFR, Part 1915 of the General Standards for all Industries published by the Occupational Safety & Health Administration (OSHA), U.S.D.L. In Part 1918 demoninated "Longshoring" the OSHA regulations relate to the han-

dling of cargo between ship and dock, and equipment regulations are limited to that hoisted to and used on board a vessel, or are used on the pier to load or unload a vessel.

There is no OSHA standard applicable to the movement of cargo into or out of a warehouse, or onto a truck or other mechanical contrivance unless there is a direct uninterrupted movement to or from a vessel.

It is clear that maritime jurisdiction ends and local jurisdiction commences when the cargo is delivered to an area on a wharf or a dock to await the instructions of the consignee as to its disposition. (Harter Act, 46 U.S.C. 190, et seq.).

Neither delay in delivery to the consignee, nor the time period in which the cargo remains on the pier can extend the application of maritime law. Indeed after the deposition of discharged cargo upon the pier, the duty of the stevedore to the ship is terminated and a new and different liability arises between the carrier and the consignee which legal relationship is determinable by state law.

> *Leathers Best, Inc.* v. *S.S. Mormaclynx,* 451 F.2d 800 (1971).

The law of bailment is then in effect and the cargo having reached a point of rest is then available for tender and delivery.

> *North American Smelting* v. *Moller Steamship Company,* 204 F.2d 384;
> *Calcot, Ltd.* v. *Isbrandtsen Company,* 318 F.2d 669;
> *Kinderman & Sons* v. *N.Y.K. Lines,* 332 F.Supp. 939.

It seems inescapable therefore, that the terms "longshoreman" and "longshoring operations", concern activities directly related to a vessel.

It would seem therefore that the term "maritime employment" relates to a vessel either by way of the handling of its cargo, or its construction, repair or breaking.

None of these terms can be expanded to include the operation of motor vehicles, railroad cars, containers, hi-lo's or other mechanical contrivances of land transportation or warehouses or terminals.

The indispensible ingredient for the application of the term "maritime employment" and its connection to "longshoring operation" is a vessel upon navigable waters.

> "That longshoremen injured on the pier in the course of loading or unloading a vessel are legally distinguished from longshoremen performing similar services on a ship is neither a recent development nor particularly paradoxical."

Victory Carriers v. *Law,* 404 U.S. page 212.

It is clear, therefore, that the 1972 amendments were enacted solely to extend to longshoremen on the pier, in the course of loading and unloading a vessel, the coverage and benefits formerly limited to those fellow-longshoremen performing like services on board a ship. The extension shoreward from the water's edge to the areas above defined was limited only for a certain kind of employee, to make him co-equal with an individual who was performing essentially the same function while on board a vessel.

It is useful to employ the term "covered employee" because that phrase is utilized in both Senate Report No. 92-1125, at page 13, and House Committee Report No. 92-1441 at page 11, and it appears as follows:

> "The committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel just because they are injured in

> an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo."

If the Congress had intended to extend the benefits under the Act as amended to each and every employee of a covered employer, it would not have amended the definition of employee as it then stood in Section 902(3) of the LHCA.

The fact that Congress did modify the definition of employee with the use of the limiting language as noted heretofore, is indicative of its intent to limit coverage to specific employees performing specific functions within the area of maritime employment.

The Court in

> *ITO Corporation of Baltimore, et al.* v. *William T. Adkins, et al.*, 4th Cir. 1975 decided 12/22/75 —— F.2d ——,

and the Ninth Circuit

> In *Weyerhauser Company* v. *Gilmore,* 9th Cir. 1975 decided 12/5/75 Reh. Den. Feb. 9, 1976,

had recourse to these committee reports and the statement of the floor leader of the bill, Senator Williams, in concluding that there was a limiting feature in the extension of coverage. That limiting feature being obviously those employees who are actually engaged in loading and unloading ships cargo.

It is submitted therefore that the congressional use in the Act of the term "longshoring operations" was a deliberate effort by Congress to limit the coverage extension to those persons as noted above.

It is noted that the congressional record, Senate July 21, 1971, contains the following:

> "Many of the workers covered by this Act are engaged in extremely hazardous work, for longshoring is one of the most dangerous of any occupations. Indeed marine cargo handling ranks the highest of all injuries in terms of injuries per man hours of work.
>
> It is therefore, especially appropriate that we now enact legislation which will insure more adequate compensation for these workers and their families."

The individuals actually engaged in the highly dangerous work of marine cargo handling were the ones Congress sought to protect by the Act.

It is only those persons actually handling cargo that are exposed to the hazards created by both shipboard and pier base machinery used in the actual process of loading and unloading. It is they who are protected by the Act.

> "Loading ships is a dangerous occupation. This is inherent in the nature of the business. It is probably for this reason that Congress has provided Workmen's Compensation for longshoremen, which plaintiff admittedly received in the present instance."
>
> *Colantuono* v. *North German Lloyd Line*, 223 F. Supp. 381, 383.

It is apparent therefore that Congress limited the extension of benefits only to those who at the time of injury were actively engaged in loading or unloading a vessel and who were injured in an area customarily used for vessel loading and unloading.

There must be the conjunction of the two, the process of loading or unloading and the area generally used in such operation.

One not so engaged or injured at a place not used for loading or unloading a vessel is relegated to State Workmen's Compensation benefits because in that instance he is not an employee as defined in Section 2, subdivision (3) of the Act.

In the instant case, respondent Scaffidi was not engaged in either loading or unloading of a vessel. Indeed he was not in an area in which such was usually accomplished.

He had transported a loaded container which had been unloaded at Pier 12 in Brooklyn, New York, to another pier denominated State Pier, distant about 1½ miles geographically one from the other.

He went through public streets for approximately ten blocks until he arrived at State Pier. It was while at State Pier that the injury occurred and it happened during the course of unloading the container which he had transported.

It is contended that it was not the intention of Congress to cover all accidents which occurred on a pier in any location even though the accident victim might have been denominated a longshoreman.

The accident must occur in that portion of the pier that is customarily used in loading and unloading a vessel. There is no parity between the unloading of a container and the unloading of a vessel.

It is obvious that Congress could have included the entire area of the pier if it had been its intent to include it within the coverage of the Act by not utilizing the express term "used by an employer in loading, unloading, etc."

It is generally known that the pier is composed of certain distinct areas.

It is the string piece that is the area of the pier proximal to the water. It is on the string piece that cargo is discharged and it is on the string piece that drafts of

cargo to be loaded aboard a vessel are constructed by longshoremen.

That is the area which comes within purview of the terms "customarily used for either the loading or unloading of a vessel". It is to that area that coverage is extended beyond the so-called Jensen line.

It is beyond question also that there are sharp and distinct delineations observed throughout the maritime industry which define and separate the loading and unloading function from the terminal, warehouse, or transshipment function.

This line of demarcation has been noted by Congress because an extraction of the written report reveals the following:

> "To take a typical example, cargo whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf or terminal adjoining the navigable waters. The employees who perform this work would be covered under the bill for injury sustained by them over the navigable waters or on the adjoining land area."

This storage or holding area noted by the committee is known as the "point of rest" throughout the entire United States.

It is at that juncture where the unloading of cargo stops and where the loading of export cargo begins.

In the vast majority of ports in this country, the loading, unloading of vessels and the movement of cargo between the vessel and the "point of rest" is performed by longshoremen employed by stevedore companies.

Those longshoremen are unquestionably covered by the Act. This petitioner has accepted jurisdiction in many

cases all involving the loading and unloading of vessels and the movement of cargo between the vessel and the point of rest.

It seems fairly obvious also that the loading and unloading process is but one of the functions performed by a stevedore company. There is handling and movement of cargo within the terminal prior to the unloading process and subsequent to the unloading process. Cargo is transferred to railroad cars, trucks and other mechanical devices. In addition containers are loaded by terminal warehouse employees who are in the employ of the marine terminal operators.

The point of rest is the dividing line between stevedoring and terminal operations and longshoring and warehousing operations.

It is a term which has been in use in this industry and has been utilized by the various regulatory agencies having jurisdiction of this industry and is referred to in many documents which emanate from labor management publications which have reason to comment on the stevedore marine terminal business.

> *American President Lines Ltd.* v. *Federal Maritime Board,* 317 F.2d 887 (CA-D.C.—1972).

The Federal Maritime Commission under the Shipping Act of 1916, 46 U.S.C. 801 et seq., in regulating the economic function of marine terminal operators as to bulk cargoes has stated:

> "* * * Point of rest shall be defined as that area on the terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading." 46 CFR 533.6(C).

It seems beyond question that the Congress and the Department of Labor, which has jurisdiction over maritime affairs and the industry in general, are fully aware of and have long recognized the distinct separation of longshoring functions from maritime terminal functions.

It is to the former that the Congress intended to apply the Act as amended and to the latter it did not.

Of necessity, the services performed by terminal operators, including railroad car and truck unloading, storage of cargo, issuance of dock receipts and their concomitants are usually charged against the cargo or to the party who requests the service, the consignee.

The services are outlined and the charges mandated in marine terminal tariffs filed with the Federal Maritime Commission.

On the other hand, longsore functions performed by a stevedoring company are rendered only to the vessel; are charged to the vessel or its agents and are not published in any tariff filed with the Federal Maritime Commission.

The functions are different. The actual risks or the potential risk are substantially different and the Congress recognized this when it drew the line of coverage between the LHCA and the applicable state laws at the same line that the marine industry traditionally has drawn between longshore employment and marine terminal operator functions. That line is commonly denominated the point of rest. Recognizing as we do that the area involved in the loading and unloading process is just as hazardous to individuals working on the pier as to those working upon a ship, the extension of coverage to the areas heretofore noted while the loading or unloading function is being performed cannot be said to be unreasonable.

There was no logical reason for the distinction in coverage between the two classes of individuals. Since they share the same perils of employment and since the degree

and severity of injury was commor to both the amendment to the Act seems to be a response to the determination of the Supreme Court in *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 90 S.Ct. 418.

In the instant claim, however, the respondent Scaffidi was not subjected to such dangers and he was not in an area where such danger would be likely. He was on a loading platform as a truck driver and obviously could not claim kinship in job or purpose with those actually engaged in the loading or unloading process.

It would serve no useful purpose at this juncture to reemphasize the differences between stevedores and marine terminal operators.

It is certain that this court is well-aware of the different functions performed by each and the legal responsibilities to different persons which arise out of the performance of such functions.

CONCLUSION

The decision and order of the Benefits Review Board should be reversed with costs to petitioners.

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